IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 55561-8
	)	
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
REGINALD DWAYNE HARRIS,	)	
	)	
Appellant.	)	FILED: August 7, 2006
	)	

ELLINGTON J. After a series of attacks on his girlfriend over a period of a month, Reginald Harris was convicted of five counts of second degree assault, one count of first degree kidnapping and one count of intimidating a witness. He challenges the sufficiency of the evidence of first degree kidnapping and witness intimidation, and contends three of the assault convictions constituted the same criminal conduct. We reject his arguments and affirm.

FACTS

Reginald Harris and Aubre Jones began an intimate relationship in June 2003. Jones lived in Kendall with her two children. Harris began staying at Jones' home in October 2003.

Late at night on December 25, 2003, Harris and Jones argued, and Harris

grabbed Jones by the neck, choked her, and slammed her into a wall. He stopped when Jones' daughter entered the room.

On New Year's Eve, Harris and Jones went out for the evening. They had an argument during the return trip. Upon arriving home, Harris pushed Jones, who locked herself in the bathroom. Harris pounded on the door hard enough to make holes in the door. Jones opened the door, and Harris slammed it so hard the mirror on the back of the door shattered. Harris threw Jones in the bathtub onto the broken glass, and choked her. He then dragged her to the couch and choked her. Then he dragged her into the bedroom and choked her on the bed.

At that point, Harris took his gun from under the pillow, chambered a round, and put the gun against Jones' cheek, telling her how easy it would be to kill her and bury her in the back yard where nobody would find her. Later, Harris took Jones' clothes off and had sex with her while she was crying.

Harris eventually fell asleep. Jones took the gun and pointed it at him, but decided not to shoot him after thinking about her children. Harris woke up and asked what she was doing, and she told him she was moving the gun so she could sleep. Harris kept Jones in the bedroom until 5 or 6 in the morning on New Year's Day.

After a further incident a few days later, when Harris choked her again after finding her calling a friend on the telephone, Jones left and stayed with friends. She returned when Harris promised to stop drinking and take an anger management course.

On January 17, Harris and Jones attended a concert in Seattle. They returned to Bellingham in the back seat of a car driven by a friend. On the journey, Harris

punched Jones in the face, breaking her nose and causing it to bleed profusely. When Jones did not stop screaming, Harris put her head in his lap and punched her in the back of the head with his fists and his gun. He also pointed the gun at her and told her he would kill her. When they arrived home, Jones got out of the car and tried to run away, but Harris caught her and dragged her into the house, where he kicked and punched her until she lost consciousness.

When she woke up, Jones persuaded Harris to let her go to the hospital by promising to lie about the cause of her injuries. She drove herself to a hospital in Skagit County because she was afraid the hospital in Bellingham would call the police. She told the doctor that she had been trampled in a fight at the Seattle concert. She had two black eyes, a broken nose and head contusions.

On January 26, Harris threatened to punch Jones' daughter, and Jones decided to end the relationship. She left the house. She returned two days later and told Harris to leave her house or she was going to call the police. Harris said he wasn't going anywhere and that he was going to take over her lease. When Jones told him he could not take over the lease and that she would call the police, Harris said, "I know who I had to call and what I had to do." Report of Proceedings (RP) (Nov. 1, 2004) at 623. Jones thought Harris was threatening to have someone come and beat her up. She asked if he was threatening her, and Harris replied, "Take it how you want to." Id.

Jones went to a nearby gas station and called police. While officers were taking her statement, Harris arrived and was arrested. He consented to a search of his car and his gun was found in the trunk.

A jury convicted Harris of five counts of second degree assault, one count of first degree kidnapping, and one count of intimidating a witness.

ANALYSIS

Sufficiency of the Evidence: Kidnapping. For the New Year's Day incidents, Harris was convicted of first degree kidnapping and second degree assault with a deadly weapon. He argues that except for the restraint incidental to the assault with the gun, which was separately charged and punished, there was insufficient evidence that he restrained Jones' movements as required for kidnapping.

Whether restraint is merely incidental to another crime or is sufficient to support kidnapping as a separate offense is a fact-specific determination based on the totality of the circumstances. State v. Green, 94 Wn.2d 216, 226–27, 616 P.2d 628 (1980). Evidence has been found sufficient to support a separate conviction for kidnapping where a rape victim was handcuffed, shackled and had her mouth taped shut, which constituted restraint above and beyond that required or typical for rape. State v. Saunders, 120 Wn. App. 800, 818, 86 P.3d 232 (2004).

A person is guilty of kidnapping in the first degree when he or she "intentionally *abducts* another person with intent: . . . . (b) To facilitate the commission of any felony [assault in the second degree] or flight thereafter; or (c) To inflict bodily injury on the him; or (d) To inflict extreme mental distress on him or a third person." RCW 9A.40.020. A person is abducted when he or she is restrained by the use or threat of use of deadly force. RCW 9A.40.010(2). A person is restrained where his or her movements are restricted "without consent and without legal authority, in a manner

which interferes substantially with his or her liberty." RCW 9A.40.010(1).

Harris contends his restraint of Jones was merely incidental to the assault. He relies upon State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980),[1] in which the defendant stabbed a young girl on a sidewalk adjacent to her apartment complex. Several residents saw Green pick her up and drag her 20 to 50 feet around a corner to an exterior loading area. She was found on the lawn in the back of the complex. He was convicted of aggravated first degree murder with first degree kidnapping as an aggravating factor. Our Supreme Court held that Green's movement and restraint of the victim were "actually an integral part of and not independent of the underlying homicide" and were "not, standing alone, indicia of a true kidnapping." Id. at 227.

This case is not similar to Green. Harris was charged with assault with a firearm, which necessarily did not occur until he retrieved the gun from under the pillow in the bedroom. His restraint of Jones, however, began when he choked her and dragged her through the house to the place where he had the gun, obviously intending to commit the assault. This is kidnapping in the first degree. Harris continued to restrain Jones after the assault by keeping her in the bedroom where he had the gun handy, for the purpose of causing her emotional distress. This too is kidnapping in the first degree. Harris' acts in choking and dragging Jones, and in keeping her in the bedroom, went far beyond the restraint necessary for the assault, and were not merely

[1]The State argues that after State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995), Green is no longer viable precedent, because the "merely incidental" analysis should be used only for double jeopardy questions. Although Calle held that there "are no non-double jeopardy reasons for reviewing multiple punishments," it did not repudiate Green or its sufficiency of the evidence test for crimes used as aggravating factors. Id. at 775.

incidental to the assault with the gun.

Harris claims the State made an election by arguing that the pointing of the gun was the restraint present in the kidnapping. This description of the State's argument is not borne out by the record. The prosecutor stated in closing argument:

> [The] State has to prove . . . the defendant intentionally abducted another person, intentionally restrained another person, intentionally restrained Aubre Jones, that the defendant restrained that person with intent to facilitate the commission of assault in the second degree, which he did, he pointed the gun at her and told her I could bury you out in the back yard.

RP (Nov. 2, 2004) at 737. This statement cannot be characterized as an election to rely on any particular act of restraint. Rather, the statement emphasizes that Harris restrained Jones with intent to commit assault and did in fact commit assault.

We agree that the restraint accomplished by pointing a gun at Jones was integral to the assault with a deadly weapon and would not support an independent charge of kidnapping. But the trier of fact could certainly find that Harris restrained Jones beforehand with intent to commit the assault, and restrained her afterward with intent to inflict emotional distress. The evidence amply supported the kidnapping conviction.

Sufficiency of the Evidence: Intimidating a Witness. A person intimidates a witness if, by use of a threat against a current or prospective witness, the person attempts to induce the witness not to report or not to give truthful or complete information relevant to a criminal investigation. RCW 9A.72.110(1)(d). Harris contends there was insufficient evidence that his statements were intended to prevent Jones from reporting his acts of domestic violence.

Harris admits that when Jones threatened to call the police, he said, "I know who

I had to call and what I had to do." RP (Nov. 1, 2004) at 623. He also admits that when she asked if he was threatening her, he said, "Take it how you want to." Id. He contends, however, that these statements cannot be considered threats.

In considering charges of intimidating a witness, jurors must ascertain the inferential meaning of statements alleged to be threats, because the literal meaning of words is not necessarily the intended communication. State v. Gill, 103 Wn. App. 435, 445, 13 P.3d 646 (2000) (quoting State v. Scherck, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973)). Jones testified that Harris had previously threatened to have her beaten up by "Keysha," a person who had once assaulted her. A rational juror could conclude that Harris' statements implied an intentional threat, which conclusion is ample support for the verdict.

Harris next contends that Jones' threat to call police was limited to her effort to evict him from her home, and that she never threatened to report his violence. He argues that where the victim never threatens to go to the police, a conviction for intimidating a witness violates the constitutional vagueness doctrine by punishing conduct an ordinary person would not know is proscribed and by providing no ascertainable standards of guilt. This argument rests upon a crabbed and unfounded reading of the statute, and amounts to the theory that a victim must actually threaten to report the crime before efforts to discourage reporting can constitute a crime. Nothing in the statute or the realm of common sense supports such a reading. The statute plainly prohibits the use of threats against a person the actor believes may have information relevant to a criminal investigation. It is irrelevant whether a police report is

actually planned or made, or whether an investigation results or charges follow. A vagueness challenge is unavailable where, as here, a defendant's conduct falls squarely within that proscribed by the statute. State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998).

Same Criminal Conduct. Crimes committed against a single victim are the same criminal conduct for purposes of sentencing if they (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.400(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The absence of any one of these criteria prevents a finding of same criminal conduct. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). A trial court's determination as to whether separate acts constitute the same criminal conduct will be reversed only for clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Harris assaulted Jones three times after the Seattle concert: twice in the car, and once after Jones ran from the car in Bellingham. The trial court ruled that the two assaults inside the car (count two, in which Harris punched Jones in the nose, and count six, in which Harris hit Jones with the gun and pointed the gun at her) were the same criminal conduct because they shared the same intent: to injure and control Jones. But the court ruled that the third assault was not the same criminal conduct, because Harris' objective intent shifted to preventing Jones from reporting the earlier assaults in the car.

Harris argues that the three assaults shared the intent to control Jones, relying

on State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999). In that case, the defendant was convicted of three counts acts of rape based upon acts occurring within a period of two minutes: digital penetration of the anus and vagina, immediately followed by penile penetration of the vagina. Because the three offenses were "nearly simultaneous in time" and the acts were committed with the same criminal intent, the court in Tili held that the acts encompassed the same criminal conduct, and the crimes should have been counted as one for offender score purposes. Id. at 123–25.

Here, however, the first two assaults occurred as the car traveled between Seattle and Everett. The third happened in Bellingham, where Jones escaped from the car and ran almost a block away, screaming for help, before Harris caught her, grabbed her by the neck, choked her and dragged her into the home. The separation of time and place, and the fact that Jones was in the process of summoning help support the trial court's conclusion that Harris' intent had changed. The court did not abuse its discretion in ruling that the third assault was not the same criminal conduct for offender score purposes.

Sufficiency of the Evidence for Assault. Harris argues that insufficient evidence supported his conviction for the Christmas Day incident, because the evidence in fact supports his claim that he was in Canada at the time.

Jones testified Harris returned to the house at 11 p.m. and assaulted her. Harris points to cell phone records showing a call from Jones' house to his cell phone at 11:45 p.m. But at trial, an official from T-Mobile testified that their records use Eastern standard time. Thus, the call logged at 11:45 p.m. actually took place at 8.45 p.m.

Pacific standard time, well before Harris returned home.

Harris also states that four defense witnesses, Elvira and DeAndre Zampieri, Shelly Allison and Barry Bell, testified that he did not leave Canada until December 26. But Bell did not recall seeing Harris after December 24, and the credibility of the remaining witnesses was in dispute. Allison and Elvira Zampieri are ex-girlfriends, dependent on Harris for child support, and DeAndre is Harris' 10-year-old son. Harris also argues Jones did not identify him as her assailant to the doctor she consulted, but the medical consultation took place after the New Year's Day assault when Harris punched her in the nose, not the Christmas Day choking incident.

It is for the jury to decide credibility, to resolve conflicting testimony, and to weigh the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992).

Witness Competency. Harris argues the court abused its discretion in failing to hold a competency hearing before Jones testified, because her psychotropic medications impaired her ability to testify. But Harris did not seek such a hearing, and he appears to place the burden on the court to order such a determination *sua sponte*. But in the absence of a prior adjudication that a witness is not competent, the burden of proving incompetency is upon the party opposing the witness. State v. Smith, 97 Wn.2d 801, 803, 650 P.2d 201 (1982). The court has no such duty absent some clear basis for doubting competency, of which there appears none whatsoever here. State v. Watkins, 71 Wn. App. 164, 170, 857 P.2d 300 (1993).

Firearm Enhancements. Harris argues that the trial court erred by imposing

separate firearm enhancements on the second degree assault and first degree kidnapping counts, because the court ruled they involved the same criminal conduct. But at the time Harris committed the assaults, former RCW 9.94A.510(3)(e) (2001) required that firearm enhancements be imposed and run consecutively to all other sentencing provisions, even when the offenses underlying the enhancements constitute the same criminal conduct. State v. Callihan,120 Wn. App. 620, 622–23, 85 P.3d 979 (2004). The court did not err.

Harris also argues the firearm enhancements were improper because the State failed to prove the firearm was operable. A firearm is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1). Even if a weapon is inoperable, it is nonetheless a firearm within the meaning of RCW 9.41.010(1) as long as it is a real gun. State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998). Test firing is not required. State v. Anderson, 94 Wn. App. 151, 162–63, 971 P.2d 585 (1999), rev'd on other grounds, 141 Wn.2d 357 (2000) (trier of fact could find gun was a firearm where two experienced officers testified the gun was loaded, appeared to be a real gun, the gun displayed a serial number and was admitted as an exhibit at trial). Harris' gun was a Glock with a serial number and was found next to a magazine containing live rounds. The gun was admitted in evidence and Harris testified the gun was his. This evidence was sufficient to support the firearm finding.

Statutory Maximum. Harris next argues his sentence exceeded the statutory maximum allowed for his crimes. The court imposed a total of 240 months

confinement, plus 24 to 48 months of community custody. The sentence comprised 108 months for the kidnapping conviction, (the lowest end of the standard range), 43 months each for the five assault charges and 57 months for the witness intimidation, (all to run concurrently), plus 132 months for the three firearm enhancements (to run consecutively).

A sentence, including enhancements and community custody, may not exceed the statutory maximum for the crime. Former RCW 9.94A.505(5), .510(4)(g); State v. Thomas, 150 Wn.2d 666, 670, 80 P.3d 168 (2003). Harris appears to believe that 144 months was the maximum sentence for his crimes. This is incorrect.

Statutory maximums apply to each offense separately. The total sentence, including enhancements, may exceed the statutory maximum for the highest level felony. Id. at 671–72. The maximum sentence for first degree kidnapping, a class A felony, is life imprisonment. RCW 9A.20.021(a). Thus, even with the 60-month firearm enhancement and the community custody term, the total confinement and community custody sentence of for the kidnapping did not exceed the maximum term. Nor did the imposition of the 36-month enhancements on the two 43-month assault sentences exceed the 120-month statutory maximum for each assault offense. There was no error in the imposition of Harris' sentence.

Merger. Harris also contends his convictions for second degree assault and kidnapping should have merged.[2] Merger refers to a "doctrine of statutory

[2] Because the merger doctrine touches constitutional double jeopardy concerns, Harris' failure to argue the merger doctrine at sentencing below does not bar review under RAP 2.5(a).

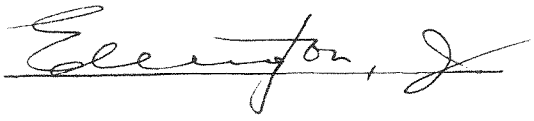
interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). To determine whether the assault and kidnapping convictions should merge, we must examine the elements of each crime to ascertain whether the Legislature intended separate punishment for the crimes. In re Fletcher, 113 Wn.2d 42, 52–53, 776 P.2d 114 (1989).

The first degree kidnapping statute specifically requires proof of intent to commit another felony. RCW 9A.40.020. However, the statute does not require that those crimes actually be committed. Fletcher, 113 Wn.2d at 52; RCW 9A.40.020. Since the the Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping, the merger doctrine does not apply. Fletcher, 113 Wn.2d at 52.

Cumulative Error. The record does not support any of Harris' claims of error, and the cumulative error doctrine does not apply. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (numerous errors, harmless standing alone, can deprive a defendant of a fair trial).

CONCLUSION

We affirm the trial court in all respects.



WE CONCUR: